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Supreme Court of the United States

OCTOBER TERM, 1929.

No. 664.

(Now No. 47, October Term, 1930.)

FULLERTON LUMBER COMPANY,

Petitioner,

vs.

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY,

Respondent.

REPLY BRIEF FOR PETITIONER.

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REPLY BRIEF FOR PETITIONER.

INACCURACIES IN RESPONDENT'S STATEMENT OF THE CASE.

The respondent's statement of the case is, we think, in certain respects, inaccurate and incorrect, so much so that it seems to us to be misleading.

1. On page 2 of their brief, counsel for respondent say:

> "In paragraph IV of its answer the defendant denied that the shipment was duly transported and alleged that the plaintiff-respondent was negligent and caused loss and damage and further alleged that said loss and damage was paid by the plaintiff (R. 5), that is, the petitioner, when suit was commenced, conceded that *any* claim for loss or damage that they sustained on this shipment had been paid." (Italics ours.)

This is the first time in this litigation, either in the trial court or in the Circuit Court of Appeals, that counsel for respondent have seen fit to make that statement. A reading of the answer will show how unsound and unwarranted the statement is. The obvious inference which counsel now, for the first time in this litigation, seek to draw, is that defendant-petitioner referred in paragraph IV of the answer to loss and damage due to respondent's mishandling of the check. That is untrue. It refers to negligence in the manner of carriage, and paragraph VI of the answer states how payment for that improper carriage or of the improper overcharge was made. What is referred to, of course, is either the incorrect weighing of the shipment or carriage thereof in such manner that it was subject to be heavily rained on, for which a claim was filed and duly paid by the railroad company, for refundment of freight, at a time when the only payment of freight it had received was by the check in controversy (R. 35). That the railroad company made such refundment was not only a recognition of its liability to refund, but was likewise a recognition by it, long after June 19, 1926, that the freight bill had actually been paid and, therefore, a refundment of charges was proper to be made. It was a recognition of the fact that long after June 19, 1926, the carrier did have something out of which to make a refund. There is no warrant for counsel's use of the word "any" in an attempt to make paragraph IV of the answer cover what it does not cover.

The complaint (R. 3-4) declared that defendant-petitioner was indebted to plaintiff in the sum of $375.96 with interest from June 16th, 1926, for freight charges on the shipment in question. The answer specifically and generally denies this (paragraphs VI, VII, R. 5-6). Respondent's reply thereto alleges fully the circumstances surrounding the giv-

ing and receipt of the check in question, and states (paragraph I):

> "That said check was duly presented to the Lumbard State Bank, the bank upon which said check was made, and said bank refused payment upon said check" (R. 7).

Delivery of the check drawn by defendant and made payable to the railroad company, to its Kimball agent, having been, in the reply, alleged and conceded (R. 7), the issues were narrowed to the question whether it was the fault of the shipper or the railroad company "that they have never received any money whatsoever on said check" (paragraph II of the reply).

Of course it was incumbent upon the railroad company to show that it dealt properly with the check, and its counsel therefore affirmatively alleged due presentment to the drawee bank. It was incumbent upon the railroad company to affirmatively prove that allegation.

2. At page 3 of their brief, respondent's counsel seek to make out that petitioner knew that the bank was shaky, by attempting to draw their own inference to that effect from the fact that petitioner had an account there. Not only is this attempted inference unsound in and of itself, not only is it not supported by any evidence in the record, but it is directly contrary to the positive proof that the Fullerton Company and its agent, J. E. Yarosh, had no knowledge that the bank was shaky, continued to make deposits and draw and deliver checks thereon up to the moment of closing, and, in fact, so far trusted the bank that they took a draft drawn upon its credit the day before the bank closed (R. 38, 40, 42-43). Mr. Yarosh, for petitioner, positively testified:

> "Q. Did you have any knowledge up to the day it closed of a likelihood that this bank would close?

A. I didn't.

Q. You did business with it on the same basis that you had always done?

A. Yes.

Q. You made this deposit of $286.88 (on June 23d) and drew checks in the usual course of business? That is a fact, is it?

A. Yes, sir" (R. 45).

In the light of this and other uncontradicted testimony, and in the light of the further fact that, upon a duly served motion for amended findings, the trial court amended his original findings so as to state that the respondent alone was aware that the Lumbard State Bank was not in good financial circumstances at the time of execution of the check (R. 54-55), striking out the words "and defendant" from the original finding, it seems to us that the effort of counsel for respondent to make, in their statement of the case, the contrary appear (Respondent's Brief, page 5, third paragraph from bottom of page), is not only highly unsound, unwarranted by anything in the evidence, but, even more, is a direct attempt to challenge now the final finding of the trial court on the point, a finding that now binds all parties and conclusively establishes the fact.

3. At page 4 of their brief, counsel for respondent say:

"The proof showed that petitioner had a bank balance in the Lumbard State Bank sufficient to pay the check in question but there is no proof that the bank had cash on hand on June 19th or any subsequent date sufficient to pay the check of $375.96."

No citations to the record are made by respondent's counsel in connection with this statement. The proof in the

case is not merely that at all times Mr. Yarosh kept, continuously, sufficient funds on deposit at the bank to cover outstanding checks (R. 38). It goes further. The testimony shows that Mr. Yarosh dealt with the bank in the regular way, made deposits, drew checks, in due course of business, up to the hour of closing (R. 40, 42). Whatever checks he had occasion to present to the bank (and he did present one on June 24th), were duly and promptly honored and paid (R. 42). It is purely an assumption by counsel when they seek to conjecture that possibly the check in the case at bar would not have been paid if promptly or properly presented for payment to the drawee bank. And there is one item of positive and uncontradicted proof in this case which, we think, wholly negatives these attempted conjectures and inferences: the fact that the bank continued open and doing business in the regular way until noon of June 25th, 1926 (R. 26; 45).

A bank undertakes that it will pay out the funds deposited with it as ordered by the depositor; the depositor's right to withdraw his deposit is absolute and the bank is bound to honor his checks when properly drawn and presented for payment; any failure, refusal or neglect to honor and pay immediately all proper orders (checks), to pay out deposits constitutes a wrong and amounts to insolvency, warranting and requiring closing of the bank forthwith by the proper authorities (see *Armstrong vs. American Exchange National Bank*, 133 U. S. 433, 464, 466; *Compiled Laws of South Dakota*, 1929, Sec. 8999, providing that "A bank shall be deemed to be insolvent * * * when it is unable to meet the demands of its creditors in the usual and customary manner * * *"; and Sec. 8925, providing that the Superintendent of Banks shall forthwith take possession of the property and business of any bank which shall "refuse to make payment of

its obligations"; *United States vs. Oklahoma*, 261 U. S. 253; *National Bank vs. Insurance Company*, 104 U. S. 54, 64; *Cunningham vs. Merchants' National Bank*, 4 F. (2d) 25, 29-30 (C. C. A., First Cir.); *Dodge vs. Maxtin*, 17 Fed. 660, 664 (Cir. Ct. W. D. Missouri, 1883); *Federal Reserve Bank of San Francisco vs. Idaho Grimm Alfalfa Growers' Assn.*, 8 Fed. (2d) 922, 927 (C. C. A., 9th Cir. 1925); *State vs. Stevens*, 16 S. D. 309, 320, 92 N. W. 420, 424; *State vs. Allen*, 240 Mass. 394, 134 N. E. 401, 20 A. L. R. 1203; *Castaline vs. National City Bank of Chelsea*, 244 Mass. 416, 138 N. E. 398; 7 *Corpus Juris* 672; 727; 1 *Morse, Banks and Banking*, 6th Ed., Secs. 311, 453, 458).

In the absence of evidence to the contrary it is to be presumed that a bank, which is open and receiving deposits in regular course of business, is solvent and able to pay orders to pay drawn on deposits (that is, checks) whenever such orders are properly presented at its counter for payment (*Sherman vs. Smith*, 185 Iowa 654, 667, 169 N. W. 216, *Mason City Brick & Tile Co. vs. Lamson*, 190 Iowa 365, 379, 180 N. W. 314 (which shows also that there is a like presumption that state officers do their duty and do not allow continuance of business if the corporation is not solvent); *Caldwell vs. City of Ottumwa*, 198 Iowa 666, 672, 200 N. W. 336; *Webb vs. Town of Eutaw*, 9 Ala. App. 474, 63 Southern 687; *Wallace vs. Hull*, 28 Georgia 68; 1 *Jones, Evidence*, 2nd Ed., page 425, Sec. 260; page 449, Sec. 273).

But the statement made by respondent's counsel is, we think, unwarranted. There is proof in this record that the check would have been promptly paid if properly presented: the statements of the two men best qualified to know the facts: Messrs. Yarosh and Gustafson, the local agents of the parties involved. Yarosh testified that he first learned on June 29th that the check had not been paid by the bank

and he immediately saw Gustafson and, when Gustafson told him that he had sent the check in to Chicago because he did not want to embarrass the bank he then told Gustafson:

> "Why didn't he say something, I could have got him the cash from the bank" (R. 38).

And Gustafson wrote to the Fullerton Lumber Company,

> "of course had we known what was going to happen we could have probably avoided the trouble" (R. 72).

They could have "avoided this trouble" or "have got him that cash" only by means of the cashing of a check at the bank and obtaining currency there at Kimball. They were both dealing with this bank every day; they were the ones who knew that the bank was honoring in regular course all checks duly presented to it up to the hour of closing. The conjectures of counsel as to the ability of the drawee bank to honor the check up to the moment of closing are refuted by the local men who knew. At all events, the statement that there is no proof in the record to the contrary is not true.

And, in any event, there was one, and only one, proper way to ascertain whether the Lumbard Bank had funds on hand with which to honor this check, and that way was to present the check at its counter for payment. Unless and until that was done, no one has any right to say that the check would not have been honored and paid. The law is settled, as we have seen, that it was the duty of the respondent to make such presentment for payment (Petitioner's Main Brief, Secs. IV, V; *Manitoba Mortgage & Investment Co. vs. Weiss*, 18 S. D. 459, 101 N. W. 37 (1904).

4. At page 4 of respondent's brief counsel say:

> "The record does not show if the Federal Reserve

Bank held the check in its bank or whether it forwarded it to the Lumbard State Bank. As it was collectible at par through the Federal Reserve Bank at Minneapolis, it may have been retained in that bank."

Such a conjecture has not the slightest proof in the record to support it, and it was incumbent upon respondent, and was not incumbent upon us, to prove what the railroad company and its collecting banks or agents did with the check after it received it. The respondent *alleged* "that said check was duly presented to the Lumbard State Bank, the bank upon which said check was made, and said bank refused payment upon said check" (R. 7). Then, in proof of this allegation, John Dickie, assistant treasurer of the Milwaukee and in charge at the time of such matters, testified as to the method they used in handling the check:

"A. Well, it was endorsed over to the Federal Reserve Bank, the date is, apparently, June 22, by the Central Trust Company of Illinois, and on June 23, was endorsed to any bank or banks by the Federal Reserve Bank of Minneapolis. They would send it out then to the Lumbard State Bank for payment. Evidently when it arrived at Kimball the bank was closed on which it was drawn and it was returned to the Federal Reserve Bank and back to the Central Trust Company.

Q. Why was the check sent to the Federal Reserve Bank at Minneapolis?

A. Because Kimball, S. D., is in the Fourth Federal Reserve District.

Q. At least at that time, Kimball was in the district of the Federal Reserve Bank of which Minneapolis was the head?

A. Yes.

Q. Was it handled then in the usual way that checks are handled.

A. It was" (R. 31).

This was the testimony as to what happened to the check, given by the official or agent of the carrier who caused it to be sent to the Central Trust Company at Chicago and then on to the Federal Reserve Bank at Minneapolis. Presumably, he knew what he was doing and why, and where the check would go in usual course of collection from the Lumbard State Bank of Kimball. No other bank could or would pay it because it was not drawn on any other bank. First Gustafson and then John Dickie were the only persons who had power over the check after it left Mr. Yarosh's hands about 2:15 P. M. on June 19th, 1926, and only they could determine where it should go, until the check was produced by them at the trial of this case on November 13, 1928. It was never in the meantime tendered back to us (R. 52) or in any way in our possession or control. Those who possessed and controlled the check during all of this time surely ought to know what they did with it and where they sent it.

The argument and inferences of counsel in their remarks contained in their statement of the case on this point do violence to the limited statutory powers of the Federal Reserve Banks as collecting agents engaged in receiving checks from correspondents and causing such checks to be presented at the proper drawee banks for payment at par without discount (see *American Bank & Trust Co. vs. Federal Reserve Bank of Atlanta*, 256 U. S. 350; *American Bank & Trust Co. vs. Federal Reserve Bank of Atlanta*, 262 U. S. 643, affirming 280 Fed. 940).

Counsel's statement regarding this check, "as it was col-

lectible at par through the Federal Reserve Bank at Minneapolis, it may have been retained in that bank" (brief, page 4), is not only a gratuitous conjecture without support in the record, but is contrary to the universal customs and methods of banks acting as collecting agents and, had the Federal Reserve Bank of Minneapolis thus retained this check without making proper and timely presentment of it at the drawee bank, it would have rendered itself liable to the Central Trust Company of Illinois or to respondent (*Federal Reserve Bank of Richmond vs. Malloy*, 264 U. S. 160, affirming 291 Fed. 763, which affirmed 281 Fed. 997).

At page 5 of their brief counsel for respondent say, "The check, of course, when it was refused, was returned to the Treasury Department of the railroad." By whom was it refused, if not by the Lumbard State Bank of Kimball?

At all events, if the statement of respondent's counsel on this matter be true, then respondent has not made out the elements of the cause of action herein pleaded, and cannot recover. The burden of showing a proper presentment of the check at the drawee bank for payment was upon respondent.

Reply to Respondent's Assertion That Certain of Our Statements of Fact Are Unsupported by the Record.

With respect to the matter of date of presentment of the check in controversy (Respondent's Brief, page 6) if, of course, the check was never presented for payment at the Lumbard State Bank of Kimball, and counsel for respondent wish to stand on that assertion, we are content to have it so. We then will have a case where the holder of a check never properly presented it for payment as the law requires.

But if, as John Dickie at least attempted to testify (R.

31), the check was in fact presented for payment, through banking channels, to the bank upon which it was drawn, the slip referred to on page 6 of respondent's brief at least shows that payment of the check was refused for the reason that the bank was closed at time of presentment. We were under the impression, at the trial, that the Federal Reserve Bank had attached a slip to this check showing the date we mentioned, but we are not sufficiently sure at this late date of that matter to stand on it. We do know that the man most vitally concerned in promptly knowing the fact of dishonor, Mr. Yarosh, local agent at Kimball, of the Fullerton Lumber Company, was not notified thereof until June 29th, whereupon he promptly sought out the railroad agent Gustafson and proceeded to question him regarding it (R. 38).

There is nothing in the record to warrant the statements of counsel for respondent (page 7 of their brief) as to the time required for transmission of the check from the Minneapolis Federal Reserve Bank to the Lumbard State Bank of Kimball. Since our statement was questioned, we have endeavored to check up on the matter, and have ascertained from those in charge at the Minneapolis Federal Reserve Bank that Kimball is on a four day schedule (for the importance and accuracy of Federal Reserve Bank time schedules, see *Pascagoula Nat. Bank vs. Federal Reserve Bank of Atlanta*, 3 Fed. (2d) 465), two days out and two days in. There is no mail delivery at Kimball by carrier, and in June, 1926, there was but one mail each way, the arriving time of the train from the east being about 3:00 P. M. If the letter containing the check in question was able to catch an evening train on June 23rd from Minneapolis, it probably arrived at Kimball on the afternoon of June 25th and was opened by the examiner in charge on Saturday, June 26, but if it did not

actually leave Minneapolis until the morning of June 24th, it would not in due course have arrived at Kimball until late in the afternoon of Saturday, June 26th, and have been opened on Monday, the 28th. After this bank closed, the examiner in charge had two closed banks on his hands at Kimball. He was required to at once inventory the Lumbard bank. We have ascertained from him that he had very little help in this and was required to take over the bank on short notice. He thinks that he returned this check by letter on June 29th, and did not receive it until the morning of that day. The Federal Reserve files which would establish the dates have been destroyed.

The other matters referred to on pages 5 to 8 of respondent's brief we do not deem it necessary to discuss. If respondent wishes to plant itself on the legal premise that an individual accepting delivery at Kimball of a check drawn on a Kimball bank is at liberty to send the check traveling around the country, depending upon the accidental matter of where the payee happens to have a bank account or bank accounts (if it keeps accounts at more than one point), then we have nothing further to add.

In this connection we submit that the attempt to justify sending the check on a journey of approximately fourteen hundred miles around through Chicago and Minneapolis by the words, "Collectible at par through the Federal Reserve Bank at Minneapolis," is really an afterthought and that, at the time the check was so sent, these words had nothing to do with the matter. Gustafson testified to circumstances wholly other than these words as being the reasons for his sending the check to Chicago (R. 18, 22, 28), and Dickie testified that it was his knowledge of the shaky financial condition of the bank which induced him to instruct Gustafson to send checks in to Chicago (R. 32-35; see Exhibit 4,

page 73). There is no intimation in any of this testimony of the agents of the railroad company that the words, "Collectible at par through the Federal Reserve Bank at Minneapolis," had anything to do with the original handling of the check. There is no proof in the record that Dickie knew such words were printed on the Lumbard Bank checks. All prior payments by checks bearing these words had been made in Kimball and the checks had been cashed in Kimball and stayed in Kimball (R. 23-25; 57-72).

THE VALIDITY OF PAYMENT OF FREIGHT BILLS BY MEANS OF CHECK HAS BEEN HERETOFORE RECOGNIZED BY BOTH THE RAILROAD COMPANY AND THE INTERSTATE COMMERCE COMMISSION.

There are certain features of this case which may well be borne in mind in connection with respondent's argument against the propriety of the use of checks in remitting payment of freight bills.

At the top of the original freight bill in this case (R. 56), which is the bill which respondent's agent delivered to Mr. Yarosh and duly receipted at the time the check in controversy was delivered, are these words:

> "Make checks payable to Chicago, Milwaukee & St. Paul Railway, H. E. Byram, Mark W. Potter and Edward J. Brundage, Receivers."

These words were, it seems to us, a specific direction to the Fullerton Company to make payment of the bill by check. In giving the check involved in the case at bar to Mr. Gustafson, the railroad company's agent, Mr. Yarosh, for the Fullerton Company, merely followed specific directions printed on the bill itself. After having given such directions to the shipper on its own freight bill, it seems to

us now highly unsound for counsel for the carrier to argue that giving of the check was unauthorized.

That the Interstate Commerce Commission has specifically recognized the propriety of payment of freight bills by check is shown by its order in *Ex Parte 73*, at page 55 of respondent's brief. Paragraph 5 thereof in part provides:

> "5. The mailing by the shipper of valid checks, drafts or money orders which are satisfactory to the carrier in payment of the tariff charges, within the period of credit prescribed above, may be deemed to be payment of the tariff charges within the period of ninety-six hours of credit. * * *"

It seems to us that this ruling of the Interstate Commerce Commission, handed down June 4, 1930, is a conclusive answer to the argument made by respondent and to the argument contained in the opinions below on the question of the use of checks.

BOTH ATTORNEYS FOR RESPONDENT PARTICIPATED IN THE CONFERENCES NARRATED IN THE APPENDIX TO PETITIONER'S BRIEF, AFTER THE ARRANGEMENT WAS ENTERED INTO.

The arrangement discussed in the Appendix to our main brief was initiated by Mr. F. W. Root, acting alone (pages II, V). Mr. Root is general solicitor at Minneapolis, as we understand it, and Mr. A. C. Erdall is his assistant, having an office next adjoining Mr. Root's and generally assisting him in the conduct of litigation. It was Mr. Erdall who, as a member of Mr. Root's office, communicated with the writer on or about April 10, 1930, and raised, for the first time, a question about the propriety of the arrangement entered into with Mr. Root. At the conference in Mr. Root's office, held at that time at his request, Mr. Erdall was pres-

ent and participated therein, and produced the cases and authorities, and discussed them in the writer's presence. He was present at some, although not all, of the later conferences held in Mr. Root's office. Mr. Root stated to Mr. Erdall, in the writer's presence, that the arrangement between counsel for the respective parties had been entered into on condition that it was to be without prejudice to our right of appeal if we chose to go on with it. It was Mr. Erdall alone who called the writer on the telephone two or three weeks afterward, stated that he was going to Chicago that night to see Mr. Dynes, and requested that I come to the Milwaukee station for a conference with him. I did so, and it was at that conference that we formally offered to Mr. Erdall to rescind the transaction. He agreed to carry that offer to Mr. Dynes, and presumably did so. He was present with Mr. Root at some conferences held after that date, although not at all of them.

In this connection the following cases are of value: (*Dakota County vs. Glidden*, 113 U. S. 222; *Mills vs. Green*, 159 U. S. 651, 654; *United States vs. Trans-Missouri Freight Assn.*, 166 U. S. 290, 308; *Illinois Central Railroad Company vs. Adams*, 180 U. S. 28; *Tennessee vs. Condon*, 189 U. S. 64; *Southern Pacific Terminal Company vs. Interstate Commerce Commission*, 219 U. S. 498; *Gulf, Colorado & Santa Fe Railway Company vs. Dennis*, 224 U. S. 503).

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